Hamdan bin Johan & Ors v FELCRA Bhd & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-L) 22–637 OF 2009
VERNON ONG JC
12 JANUARY 2010

Constitutional Law — Executive — Menteri Besar — Whether Menteri Besar and state government separate legal entities — Whether state government bound by Menteri Besar's actions

Contract — Breach — Damages — Remoteness of damages — Claim for loss due to physical displacement suffered under aborted FELCRA scheme — Claim for loss of profits under aborted FELCRA scheme — Whether recoverable — Rule in Hadley v Baxendale — Contracts Act 1950 s 74

Contract — Breach — Repudiatory breach — Innocent party's option whether to accept repudiation or to affirm contract — Plaintiff accepting compensation payment from defendant under protest — Whether amounted to acceptance of repudiation

Land Law — Alienation and incidents — Application for state land — Agreement by Menteri Besar in principle to alienate land under FELCRA scheme — Failure to alienate — Whether state government bound to carry out alienation — Whether plaintiffs were occupants in expectation of title under s 12 of the Land (Group Settlement Areas) Act 1960 — Whether plaintiffs had legitimate expectation to receive titles to respective landholdings

In 1994 the Federal Land Consolidation and Rehabilitation Authority ('FELCRA') (the first defendant) invited the plaintiffs to take part in a project for the development of an oil palm plantation known as Felcra Tebing Runtuh ('FTR'). By a letter dated 4 April 1995 the Menteri Besar Johor agreed in principle that the FTR land be alienated to the plaintiffs. Shortly thereafter the land on which FTR was located was scheduled for the development of the Malaysia-Singapore second link. The plaintiffs expressed dissatisfaction with the low and unreasonable compensation given by United Engineering Malaysia Bhd. It was then agreed at a meeting between the plaintiffs and the defendants that to overcome this problem the plaintiffs be alienated with titles of their respective lands. The plaintiffs were required to execute an agreement with the first defendant. In 1995 all the plaintiffs

entered into separate and individual agreements with the first defendant ('the agreement'). The plaintiffs in suit 637 were each allotted one unit of share equivalent to six acres of land and provided with houses constructed by the first defendant. The plaintiffs in suit 638 were each allotted one unit of share each for the value of four acres of land; they were not provided with houses by the first defendant. In 2001 the plaintiffs each received compensation amounting to RM358,688.58 and were asked to leave FTR. The plaintiffs being dissatisfied with the compensation commenced this action. The plaintiffs contended that they had legitimate expectation to receive titles to their respective landholdings and or a legitimate expectation to receive adequate compensation as persons having rights and interest in land based on the principles of justice and fairness. The following issues arose to be determined: (a) whether the plaintiffs had an interest in the land; (b) whether the first defendant repudiated the agreement and if so, whether the plaintiffs accepted the repudiation; and (c) whether the plaintiffs were adequately compensated.

Held, allowing the plaintiffs' claim against the first defendant with costs and dismissing the plaintiffs' claim against the second and third defendants with costs:

(1) The land was State of Johor's land. The land had not been alienated to the plaintiffs or to the first defendant. The plaintiffs were not the registered owners of the land under the National Land Code or the Land (Group Settlement Areas) Act 1960 ('GSA Act'). There was no evidence to show that the FTR land had been gazetted as a group settlement area under the GSA Act; neither was there any evidence that the plaintiffs were registered as occupants in expectation of title under s 12 of the GSA Act (see para 11).

(2) The third defendant was not under any obligation to carry out what the Menteri Besar agreed to in principle. The third defendant and the Menteri Besar are separate legal entities, although the Menteri Besar formed part of the third defendant (see para 11).

(3) The plaintiffs' contention that they had a legitimate expectation to receive titles to their respective landholdings was misconceived and without merit (see para 12).

(4) In refusing to perform its obligations under the agreement in its entirety the first defendant had clearly repudiated or renounced the agreement. As the agreement had been broken, the plaintiffs were entitled to be compensated for damages for any loss which they had suffered by reason of the breach. The plaintiffs being the innocent parties had the option of either (i) to terminate the agreement, or (ii) to affirm the agreement. The plaintiffs had opted to accept the breach when they accepted the

compensation payment from the second defendant under protest and moved out of FTR and or surrendered their rights under the agreement (see paras 15–16).

(5) The measure of damages recoverable for breach of contract involves the consideration of s 74 which substantially affirms the common law rule laid down in *Hadley v Baxendale* (1854) 156 ER 145. The common law rule in the assessment of damages consists of two limbs. The first limb concerns damages flowing naturally, ie in the normal course of things from the breach. The second limb concerns the damages that the parties at the time of the making of the contract may reasonably be supposed to have contemplated, as the probable result of the breach. In the assessment of damages for breach of contract, the general rule is that the aggrieved party be put in the same position as if the contract had been performed so that normally he is entitled to recover from the contract breaker his loss of profits (see paras 19–20).

(6) Under the agreement the plaintiffs agreed to sell all the harvested oil palm fruits to the first defendant. The market price of oil palm fruits would have fluctuated between 1997–2000. Taking the 1996 figures as a guide, the total amount distributed to each of the participants was RM1,356 per participant. Allowing for an increase in production over the years and subject to a commensurate increase in operating expenditure, the amount that would have been distributed to each participant was about RM3,000pa from 2001–2009, which computed to RM27,000 for each plaintiff (see paras 23–24).

(7) It was also reasonable to consider the loss for the displacement suffered by the plaintiffs. The plaintiffs had settled in FTR since 1994. When they agreed to take part in FTR they had expected it to be a long term commitment. Instead they were displaced after a period of seven years. They had given up their former vocations after resettling in FTR. After their displacement many of them lost their livelihood and had to make a fresh start in life. For the loss due to displacement of their lives, compensation of about RM500,000 per participant was a fair and reasonable sum (see para 25).

[Bahasa Malaysia summary

Pada tahun 1994, Federal Land Consolidation and Rehabilitation Authority ('FELCRA') (defendan pertama) mengajak plaintif-plaintif untuk mengambil bahagian dalam suatu projek membangunkan sebuah ladang minyak kelapa sawit yang dikenali sebagai Felcra Tebing Runtuh ('FTR'). Menerusi sepucuk surat bertarikh 4 April 1995, Menteri Besar Johor bersetuju secara prinsipnya bahawa tanah FTR itu diberi hakmilik kepada plaintif-plaintif. Kemudiannya tanah FTR tersebut dijadualkan untuk pembangunan lingkaran kedua Malaysia-Singapura. Plaintif-plaintif menyuarakan rasa tidak puas hati

terhadap pampasan yang tidak berpatutan dan rendah yang diberikan oleh United Engineering Malaysia Bhd. Kemudiannya telah dipersetujui dalam suatu mesyuarat antara plaintif-plaintif dan defendan-defendan bahawa untuk mengatasi masalah ini, plaintif-plaintif hendaklah diberi hakmilik ke atas tanah mereka masing-masing. Plaintif-plaintif dikehendaki menyempurnakan suatu perjanjian dengan defendan pertama. Pada 1995, kesemua plaintif menandatangani perjanjian-perjanjian yang berasingan dan individu dengan defendan pertama ('perjanjian tersebut'). Plaintif-plaintif dalam guaman 637 diberikan satu unit saham yang bersamaan dengan enam ekar tanah dan diberikan rumah-rumah yang didirikan oleh defendan pertama. Plaintif-plaintif dalam guaman 638 diberikan satu unit saham yang bersamaan dengan nilai empat ekar tanah, mereka tidak diberikan rumah oleh defendan pertama. Dalam tahun 2001 plaintif-plaintif masing-masing menerima pampasan berjumlah RM358,688.58 dan diminta meninggalkan FTR. Plaintif-plaintif tidak berpuas hati dengan pampasan itu memulakan tindakan ini. Plaintif-plaintif berhujah bahawa mereka mempunyai jangkaan yang sah untuk menerima pampasan yang berpatutan sebagai orang yang mempunyai hak dan kepentingan terhadap tanah tersebut berdasarkan prinsip keadilan dan saksama. Isu-isu berikut dibangkitkan untuk dipertimbangkan: (i) sama ada plaintif-plaintif mempunyai kepentingan atas tanah tersebut; (ii) sama ada defendan pertama menolak perjanjian tersebut dan jika ya, sama ada plaintif-plaintif menerima penolakan tersebut; dan (iii) sama ada plaintif-plaintif dipampas sewajarnya.

Diputuskan, membenarkan tuntutan plaintif-plaintif terhadap defendan pertama dengan kos dan menolak tuntutan plaintif-plaintif terhadap defendan kedua dan ketiga dengan kos:

(1) Tanah tersebut adalah milik Negeri Johor. Tanah tersebut tidak diberi milik kepada plaintif-plaintif atau defendan pertama. Plaintif-plaintif bukan pemilik berdaftar tanah tersebut seperti di bawah Kanun Tanah Negara atau Akta Tanah (Kawasan Penempatan Berkelompok) 1960 ('Akta Tanah'). Tiada keterangan yang menunjukkan bahawa tanah FTR tersebut telah diwartakan sebagai kawasan penempatan berkelompok di bawah Akta Tanah tersebut; juga tiada keterangan menunjukkan bahawa plaintif-plaintif didaftarkan sebagai pemilik dalam jangkaan pemilikan di bawah s 12 Akta Tanah tersebut (lihat perenggan 11).

(2) Defendan ketiga tidak berkewajipan melaksanakan apa yang telah dipersetujui secara prinsipnya oleh Menteri Besar. Defendan ketiga dan Menteri Besar merupakan entiti perundangan yang berasingan, walaupun Menteri Besar adalah sebahagian daripada defendan ketiga (lihat perenggan 11).

(3) Hujahan plaintif-plaintif bahawa mereka mempunyai jangkaan sah untuk menerima milikan ke atas tanah-tanah tersebut adalah salah tanggapan dan tidak bermerit (lihat perenggan 12).

(4) Apabila ia tidak mahu melaksanakan tanggungjawabnya di bawah perjanjian tersebut dalam keseluruhannya, defendan pertama dengan jelas telah menolak atau melepaskan perjanjian tersebut. Memandangkan perjanjian tersebut telah dimungkiri, plaintif-plaintif berhak untuk dipampaskan bagi ganti rugi atas apa-apa kehilangan yang telah dialami akibat kemungkiran tersebut. Plaintif-plaintif yang merupakan pihak yang tidak bersalah mempunyai pilihan untuk, sama ada (i) menamatkan kontrak tersebut, atau (ii) mengesahkan perjanjian tersebut. Plaintif-plaintif telah memilih untuk menerima kemungkiran tersebut apabila mereka menerima bayaran pampasan daripada defendan kedua dengan bantahan dan keluar dari FTR dan atau menyerahkan hak-hak mereka di bawah perjanjian tersebut (lihat perenggan 15–16).

(5) Ukuran untuk menentukan ganti rugi yang boleh didapatkan kembali bagi kemungkiran kontrak yang melibatkan s 74 yang secara substansialnya mengesahkan peraturan common law di bawah kes *Hadley v Baxendale* (1854) 156 ER 145. Peraturan common law mengenai penaksiran ganti rugi terbahagi kepada dua bahagian. Bahagian pertama adalah mengenai ganti rugi yang berlaku secara semulajadi, iaitu dalam peredaran biasa yang berlaku akibat kemungkiran tersebut. Bahagian kedua mengenai ganti rugi yang pihak-pihak pada masa membuat kontrak tersebut boleh sewajarnya menganggarkan kemungkinan akibat kemungkiran tersebut. Dalam menaksirkan ganti rugi kemungkiran kontrak tersebut, peraturan amnya ialah pihak yang terkilan harus dikembalikan dalam kedudukan sepertimana kontrak tersebut terlaksana agar dia berhak mendapat kembali daripada pihak yang mungkir, kehilangan keuntungannya (lihat perenggan 19–20).

(6) Di bawah perjanjian tersebut, plaintif-plaintif bersetuju menjual kesemua hasil buah kelapa sawitnya kepada defendan pertama. Harga pasaran buah kelapa sawit tentunya berubah-ubah antara tahun 1997–2000. Menggunakan jumlah dalam tahun 1996 sebagai panduan, jumlah keseluruhan yang diagih-agihkan kepada setiap peserta ialah RM1,356 setiap peserta. Mengambilkira peningkatan pengeluaran bagi tahun-tahun yang lepas dan tertakluk kepada peningkatan dalam perbelanjaan operasi, jumlah yang akan diagih-agihkan kepada setiap peserta adalah kira-kira sebanyak RM3,000 setahun dari 2001–2009, yang berjumlah sebanyak RM27,000 untuk setiap plaintif (lihat perenggan 23–24).

(7) Juga adalah wajar untuk mengambilkira kehilangan penempatan yang dialami oleh plaintif-plaintif. Plaintif-plaintif telah menetap di FTR semenjak tahun 1994. Apabila mereka bersetuju untuk mengambil bahagian dalam FTR, mereka menjangkakan projek tersebut adalah komitmen jangka panjang. Tetapi sebaliknya, mereka dipindahkan selepas tujuh tahun. Mereka telah meninggalkan penempatan mereka yang terdahulu setelah menetap di FTR. Setelah dipindahkan, kebanyakan mereka hilang punca pendapatan dan terpaksa memulakan hidup baru. Bagi kehilangan akibat daripada dipindahkan, pampasan sebanyak RM500,000 bagi setiap peserta adalah adil dan wajar (lihat perenggan 25).]

Notes

For cases on alienation and incidents in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2222–2248.

For cases on damages, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2644–2670.

For cases on executive in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2025–2034.

For cases on repudiatory breach, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2749–2755.

Cases referred to

Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346; [1983] 2 AC 629, PC (refd)

Basnol Abol & Ors v The State Government of Sarawak & other appeals [2004] 2 CLJ 553, FC (refd)

Central Malaysia Development Co Ltd v Chin Pak Chin [1967] 2 MLJ 174, HC (refd)

Chuah Say Hai & Ors v Collector of land Revenue, Kuala Lumpur [1967] 2 MLJ 99, HC (refd)

Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 MLJ 309; [2008] 4 CLJ 538, CA (distd)

Goh Seng Peow & Sons Realty Sdn Bhd v The Collector of Land Revenue, Wilayah Persekutuan [1986] 2 MLJ 395, HC (distd)

Hadley v Baxendale (1854) 156 ER 145 (folld)

Hock Lim Estate Sdn Bhd v Collector of Land Revenue, Johore Bahru [1980] 1 MLJ 210, FC (refd)

HP Projects Sdn Bhd v Investprop (M) Sdn Bhd [2005] 6 MLJ 409, CA (distd)

Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452, CA (refd)

Magasu Sundram a/l T Magasu & Ors v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2003] 5 MLJ 470, HC (distd)

R v North and East Devon Health Authority Ex parte Coughan [2001] QB 213, CA (distd)

Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, CA (refd)
Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors [1982] 1 MLJ 313; [1982] CLJ 321, FC (refd)
Toeh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39, FC (refd)
Zainal Abidin v Century Hotel Sdn Bhd [1987] 1 MLJ 236, SC (distd)

Legislation referred to

Contracts Act 1950 ss 40, 74(1), (2)
Federal Constitution art 13
Land Acquisition Act 1960 s 2
Land (Group Settlement Areas) Act 1960 ss 2, 12, 19, 20, 35
National Land Code
National Land Rehabilitation and Consolidation Authority (Incorporation) Act 1966

Desmond Lewis (K Sasindran, JJ Naidu and S Jayakumar with him) (Nor Ding & Co) for the plaintiffs.
Syed Faisal (Syed Faisal & Co) for plaintiffs 22–638 of 2009.
Wan Sharifah bt Wan Yusoff (Wan Sharifah Jamilah & Partners) for the first defendant.
Abd Rahman Putra bin Taha (State Legal Advisor, State Legal Advisor Office) for the second and third defendants.

Vernon Ong JC:

[1] The plaintiffs were participants in a FELCRA agricultural project for the planting of oil palm in Johor. In 2001 the land was reacquired by the Johor State Government (the second and third defendants) and the plaintiffs received compensation. The plaintiffs are seeking declaratory orders affecting their rights as participants and for loss and damages for being dispossessed of their respective land holdings in the said project.

THE FACTS AS DISCLOSED IN THE EVIDENCE

[2] In 1994 the Federal Land Consolidation and Rehabilitation Authority (Felcra) (the first defendant) invited the plaintiffs to take part in a project for the development of an oil palm plantation known as Felcra Tebing Runtuh ('FTR'). By a letter dated 4 April 1995 the Menteri Besar Johor agreed in principle that the FTR land be alienated to the plaintiffs. On 22 July 1995 there was a meeting between representatives of the first defendant, the Pentadbir Daerah Tanah Johor Bahru (second defendant) and third defendant, a representative of a political party and the plaintiffs' representative one Madon bin Johan ('PW4'). The land on which FTR was located was scheduled for the development of the Malaysia-Singapore second

link. They expressed dissatisfaction with the low and unreasonable compensation given by United Engineering Malaysia Bhd. The meeting agreed that in order to overcome this problem the plaintiffs be alienated with titles of their respective lands. The plaintiffs were required to execute an agreement with the first defendant and PW4 was asked to explain the situation to the plaintiffs. In 1995 all the plaintiffs entered into separate and individual agreements with the first defendant ('the agreement'); the agreement were only dated and stamped in 1997. The agreement took effect retrospectively from 15 August 1994. The plaintiffs in suit 637 were each allotted one unit of share equivalent to six acres of land and provided with houses constructed by the first defendant. The plaintiffs in suit 638 were each allotted one unit of share each for the value of four acres of land; they were not provided with houses by the first defendant. In 2001 the plaintiffs each received compensation amounting to RM358,688.58 consisting of RM173,688.58 in cash, a plot of land valued at RM135,000 together with a house valued at RM50,000 erected thereon and asked to leave FTR. The third defendant has taken back the FTR land for the development of 'Projek Laluan Kedua Malaysia-Singapura Dan Pembangunan Bandar Nusa Jaya.'

THE PLAINTIFFS' CASE

[3] The plaintiffs contend that they have rights and interest in their respective landholding of one shares each consisting of four or six acres in FTR. Under the National Land Rehabilitation and Consolidation Authority (Incorporation) Act 1966 ('FELCRA Act') and the Land (Group Settlement Areas) Act 1960 ('GSA Act') the plaintiffs have a legitimate expectation to receive titles to their respective landholdings and or a legitimate expectation to receive adequate compensation as persons having rights and interest in land based on the principles of justice and fairness. The plaintiffs also contend that they have never received any notice relating to the termination of the agreement, termination of their participation in FTR, or of any breach of contract from the first defendant. They were not accorded any hearing on the adequacy of compensation. The valuation report dated 27 December 1992 relied on by the defendants in arriving at a value for compensation was outdated and irrelevant as at the date the plaintiffs were dispossessed from FTR. The defendants have also violated the GSA Act, the Land Acquisition Act 1960 (Act 486), and art 13 of the Federal Constitution.

THE FIRST DEFENDANT'S CASE

[4] The first defendant was appointed by the third defendant to develop FTR. The first defendant's duty is limited to the rehabilitation and development of the land for the purpose of cultivation of oil palm plantation. The land was not gazetted under the GSA Act. The selection of the

participants for the FTR project was not within the first defendant's control; it was vested in the third defendant. Under the National Land Code only the power to alienate the land is vested in the sole discretion of the third defendant and not the first defendant. The plaintiffs have been discharged from further performance under the agreement upon receipt of the compensation (*Basnol Abol & Ors v The State Government of Sarawak & other appeals* [2004] 2 CLJ 553; *Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313; [1982] CLJ 321; *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346; ss 12, 19 and 20 of the GSA Act). By their conduct of receiving the compensation offered by the second and third defendants the plaintiffs have evinced an intention not to be further bound by the agreement. The plaintiffs have been duly informed of the intended acquisition of the FTR land through their representative PW4 who attended the meeting on 22 July 1995. The plaintiffs were given the right to be heard on the issue of compensation (*Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236; *HP Projects Sdn Bhd v Investprop (M) Sdn Bhd* [2005] 6 MLJ 409).

THE SECOND AND THIRD DEFENDANTS' CASE

[5] The plaintiffs have no legal rights in the land under the FTR. The third defendant, the Majlis Mesyuarat Kerajaan Negeri Johor, the EXCO, secretary to the Menteri Besar are not one and the same entity. The secretary to the Menteri Besar had no authority to act on behalf of the third defendant (*Basnol Abol & Ors*). The plaintiffs were given the right to be heard through PW4 at the meeting. The plaintiffs have no legitimate expectation against the third defendant; there was no agreement between the second and third defendants and the plaintiffs. The plaintiffs are not registered as owners under the National land Code ('NLC'); neither were they registered under the GSA Act. Under the NLC only the state authority has the power to alienate land.

FINDINGS OF THE COURT

[6] The question of the adequacy of compensation is dependent upon whether the plaintiffs have any rights or interest in the FTR land. It is also pertinent to determine if the first defendant repudiated the agreement; and if so, whether the plaintiffs accepted the repudiation. Accordingly, the issues to be determined are as follows:

(a) whether the plaintiffs have an interest in the land;

(b) whether the first defendant repudiated the agreement? If so, whether the plaintiffs accepted the repudiation; and

(c) whether the plaintiffs were adequately compensated.

(a) Whether the plaintiffs have an interest in the land

[7] It is the plaintiffs' contention that they have an interest in the land by virtue of their respective holding of one unit of share under the agreement. The plaintiffs in suit 637 entitlement for their one unit of share is equivalent to six acres in FTR. In order to appreciate the plaintiffs' argument, it is necessary to examine the salient features of the agreement as follows:

(a) The first defendant agreed to register each and every one of the plaintiffs as a holder in the register of holdings holding one share equivalent to four or six acres, as the case may be, in FTR under s 35 of the GSA Act (cl 11).

(b) The plaintiffs agreed to pay to the first defendant all expenses incurred or advanced by the first defendant for the development of FTR. The payments to the first defendant will be paid by the plaintiffs in installments over a period of 15 years by way of deductions from the income derived from the sale of oil palm fruits from FTR (cll 13B & 14)

(c) The plaintiffs also agreed to pay the annual charge under s 20 of the GSA Act to the third defendant. The payments are to be made to the first defendant in 15 annual installments by deductions from the profits of the shares registered in each plaintiff's name (cl 13A).

(d) Once the payments under cl 13A and 13B have been satisfied, the first defendant will return the whole of FTR site to the third defendant for alienation to the plaintiffs whether by way of shares in a co-operative or other method (cl 19)

(e) The agreement is deemed to be in force with effect from 15 August 1994.

[8] The plaintiffs also contended that the FELCRA Act was enacted to uplift the living standards of the poor rural folk. The first and third defendants having encouraged the plaintiffs to participate in the FTR scheme gave the plaintiffs a direct interest in their respective landholdings as persons occupying the landholdings in expectation of title and thereby being interested in the land. The plaintiffs have a legitimate expectation to receive the titles to their respective landholdings (art 13 of the Federal Constitution; s 2 of the Land Acquisition Act 1960 ('LA Act'); *Magasu Sundram a/l T Magasu & Ors v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2003] 5 MLJ 470; *Goh Seng Peow & Sons Realty Sdn Bhd v The Collector of Land Revenue, Wilayah Persekutuan* [1986] 2 MLJ 395; *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309;

[2008] 4 CLJ 538 (CA) and s 2 of the GSA Act; *R v North and East Devon Health Authority Ex parte Coughan* [2001] QB 213 (CA)). A

[9] The underlying principle behind the doctrine of legitimate expectation is founded on the duty to act fairly as a necessary element or concomitant of good governance or good administration (*W Wade & C Forsyth*, *Administrative Law* (8th Ed) (Oxford University Press: Oxford, 2000) 494–495; and *Fiadjoe, Commonwealth Caribbean Public law* (2nd Ed) (Cavendish Publishing Limited: London, 1999) at pp 34–35). The doctrine of legitimate expectation was initially recognised by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA) to denote something less than a right which may nevertheless be protected by the principles of natural justice; or an expectation of receiving some benefit or privilege to which the individual has no right (see *Darahman bin Ibrahim*). In the Privy Council case of *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 Ng Yuen Shiu an illegal immigrant challenged a deportation order. He contended that the Hong Kong government had previously given an undertaking that each case would be considered on its merits and that he was denied the opportunity of being heard. The Privy Council held that Ng had a legitimate expectation that a certain procedure would be followed and it was in the interest of good administration that the authorities should act fairly by implementing its stated policy. Lord Fraser said that 'legitimate expectations in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis'. His Lordship identified three practical questions underlying all legitimate expectation cases. They are: B C D E F

(a) To what has the authority committed itself?

(b) Has the authority acted unlawfully in respect of its commitment?

(c) What should the court do about it? G

[10] Thus, in *Darahman bin Ibrahim*, at p 566 the Court of Appeal said that 'where an applicant can demonstrate that a legitimate expectation has arisen, he has a powerful argument against a public body which has otherwise acted pursuant to the discretionary powers or duties lawfully conferred upon it. It is germane to state that a legitimate expectation in its procedural from arises where there has been a failure to follow an agreed, or customary, process of consultation. In the main, it is concerned about the quality of the decision making process'. H I

[11] Whether an expectation exists is a question of fact. Land is defined to include land tenure, Malay reservations, permits and licences for prospecting mines, compulsory acquisition of land, transfer of land, mortgages; leases and charges, easements escheat, treasure trove excluding antiquities (Federal

Constitution Sch 9 List II). Though land is essentially a state matter, the National land Code has been promulgated to consolidate the laws relating to land and land tenure, the registration of title to land and of dealing therewith and the collection of revenue there from within the various states including the State of Johore. In this case the land in question is the State of Johor's land. The land has not been alienated to the plaintiffs or to the first defendant. The plaintiffs are not the registered owners of the land under the NLC or the GSA Act. The land was not subjected to an acquisition under LA Act; it was reacquired by the third defendant. The alienation of land is subject to the provisions of the NLC. There is no evidence to show that the FTR land has been gazetted as a group settlement area under the GSA Act; neither is there any evidence that the plaintiffs are registered as occupants in expectation of title under s 12 of the GSA Act. The plaintiffs also contended that vide the letter dated 4 April 1995 (exh P43) the third defendant had agreed to alienate the landholdings to the plaintiffs. P43 is a letter written by the secretary to the Menteri Besar Johor. Under the NLC the state authority is defined as the ruler or governor of the state, as the case may be. It follows that the state authority and the Menteri Besar are not synonymous. Accordingly, the third defendant is not under any obligation to carry out what the Menteri Besar agreed to in principle. The third defendant and the Menteri Besar are separate legal entities, although the Menteri Besar formed part of the third defendant (*Basnol Abol & Ors*). The plaintiffs also contend that under cl 19 of the agreement the first defendant agreed to hand back the FTR land to the third defendant to be alienated to the plaintiffs. In the same vein the first defendant's representations in cl 19 is not binding on the third defendant as the first and third defendant are separate legal entities. In the circumstances the third defendant has not committed itself to the plaintiffs to alienate the FTR land to the plaintiffs.

[12] The cases cited by learned counsel for the plaintiffs are distinguishable. In *Mangasu Sundram* the intended intervener applied to be included as a party to the action concerning the acquisition of land under the LA Act. Allowing the application the High Court held that the term 'person interested' is inconclusive and a person can be said to be interested if he has interest in the land either directly or indirectly or if he has interest in the compensation in respect of the land acquired. That case is distinguishable for a number of reasons. Firstly, the FTR land was not acquired under the LA Act; secondly, the plaintiffs have not been able to identify or delineate their respective landholding as the FTR land has not been alienated or subdivided. In *Goh Seng Peow & Sons Realty Sdn Bhd*, the applicant company was the registered owner of two lots of land which had been compulsorily acquired under the LA Act. The applicant company only came to know of the acquisition proceedings after the compensation award was made by the respondent. The applicant company contended that the acquisition proceedings were illegal, null and void as they had no notice whatsoever of

the acquisition proceedings and the necessary notices were not served on them as required by law. The High Court ruled that the acquisition proceedings had taken place contrary to the LA Act and in breach of the fundamental rules of natural justice and the applicant company has made out a case that its constitutional right might have been impinged, contrary to art 13 of the Federal Constitution thus entitling the applicant company to seek a declaration. That case is also distinguishable on the facts as the applicant company was the registered owner of the two lots of land whereas in this case the plaintiffs are not; further that case related to an acquisition under the LA Act. In *Darahman bin Ibrahim*, the plaintiffs who were displaced by a dam project were resettled in an area known as Lubuk Sireh. The plaintiffs contended that in consideration of their agreeing to resettle in Lubuk Sireh the second defendant had promised to provide them not only compensation for loss of land, houses, etc and a plot of land to build their houses; they were also promised participation in the agricultural estate undertaken by Felcra. The High Court dismissed their claim. On appeal the Court of Appeal found that there was overwhelming evidence that the plaintiffs were accepted as participants of the FELCRA scheme. *Darahman bin Ibrahim* is also distinguishable on the facts. In the present case whether or not the plaintiffs are participants of FTR is not disputed. For the foregoing reasons the plaintiffs' contention that they have a legitimate expectation to receive titles to their respective landholdings is misconceived and without merit. The question is therefore answered in the negative.

(b) Whether the first defendant repudiated the agreement? If so, whether the plaintiffs accepted the repudiation

[13] The agreement is for the duration of 15 years and scheduled to lapse on 14 August 2009. The first defendant contends that the plaintiffs were informed that the FTR land would be used for the construction of the Malaysia-Singapore second link when PW4 attended the meeting on 22 July 1995. The meeting also expressed their dissatisfaction over the compensation offered by UEM. The first defendant's contention is that in receiving the compensation the plaintiffs have evinced an intention not to be bound by the agreement (*Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236 (SC); *HP Projects Sdn Bhd v Investprop (M) Sdn Bhd* [2005] 6 MLJ 409). In *Zainal Abidin* the appellant entered into a tenancy agreement with the respondent for the sublet of the third floor of the hotel for three years. Subsequently the respondent decided to close down the hotel and ordered the appellant to cease operating the recreation health centre run by the appellant. The appellant sued for breach of the tenancy agreement and claimed damages. The trial judge gave judgment for the appellant but dismissed the claim for loss of profits for the remaining period of the lease and the respondent cross-appealed on liability. The cross-appeal by the respondent was dismissed;

the Supreme Court agreed with the finding of the trial judge that after the respondent had resolved to close down the hotel and ordered the appellant to stop operating the health centre, the conduct of the respondent evinced a clear intention to determine and put an end to its obligations under the tenancy agreement. In *HP Projects Sdn Bhd* the respondent landlord terminated the tenancy agreement with appellant on 10 May 1994. The appellant tenant, inter alia, contended that the respondent landlord had waived its rights to terminate the tenancy agreement when the respondent landlord accepted rental payment from the appellant as late as 12 November 1994 the date after the purported termination. The Court of Appeal took the view that the appellant's claim should be considered in relation to the date of the termination of the tenancy agreement. If such rental was accepted by the respondent subsequent to the date of termination then there may be merits in the appellant's argument; otherwise it should be rejected. If it was before then there is no issue since the tenancy was still subsisting. If it was after, then such act may amount to a waiver on the part of the respondent, as landlord, to terminate the tenancy. Since the date of lawful termination is 14 December 1994, there is no waiver on the part of the respondent in accepting such rental as the tenancy was still subsisting at that material time. The respondent had every right during the subsistence of the tenancy to collect rental. As can be seen, the facts of both cited cases are distinguishable from the present case and are therefore irrelevant.

[14] After the first defendant's offer to participate in FTR was accepted some of the plaintiffs resettled into the houses provided by the first defendant in FTR. The first defendant employed workers to maintain the oil palm plantation and harvest the oil palm fruits. The first defendant purchased the oil palm fruits and deducted the sale proceeds towards payment of the first defendant's operating expenses and other deductions under the agreement. Some of the plaintiffs were employed by the first defendant to work on the oil palm plantation.

[15] The fact that the first defendant did not give any notice of termination of the agreement to the plaintiffs is not disputed. The first defendant conceded that the plaintiffs have not committed any breach of the agreement. Yahya bin Yusofe ('DW4') the general manager of the first defendant for Johor region said that the first defendant did not force or order the plaintiffs to leave FTR. DW4's testimony is, however, contradicted by the first defendant's letters to the plaintiffs dated 16 April 2001 (ex P45). In those letters the plaintiffs were asked to collect compensation at the second defendant's office. P45 constitutes the only written notice issued by the first defendant to the plaintiffs and it falls far short of a notice of termination. DW4 said that the agreement could not be performed as the FTR land had been acquired by the third defendant. DW4 said that the plaintiffs knew

about the acquisition through news reports and information session conducted by the first defendant. The first defendant did not object to the acquisition as it was only the developer of the state land. In issuing P45 the first defendant has clearly shown that it no longer intended to be bound by the agreement. On the evidence the court finds that by its conduct, in particular, vide P45, the first defendant had indicated to the plaintiffs that it did not intend to go on with the agreement (s 40 of the Contracts Act 1950). This act constitutes a breach of the agreement on the part of the first defendant. In refusing to perform its obligations under the agreement in its entirety the first defendant have clearly repudiated or renounced the agreement.

[16] It is well established that repudiation by the first defendant does not put an end to the agreement. As the agreement has been broken the plaintiffs are entitled to be compensated for damages for any loss which they have suffered by reason of the breach. The plaintiffs being the innocent parties have the option of either (i) to terminate the agreement, or (ii) to affirm the agreement. On the evidence the court finds that the plaintiffs have opted to accept the breach when they accepted the compensation payment from the second defendant under protest and moved out of FTR and or surrendered their rights under the agreement. This is borne out by two incidents. Firstly, by the plaintiffs' solicitor's letter dated 2 May 2001 (ex P46) to the second defendant stating that the plaintiffs were dissatisfied with the compensation and that they were compelled to accept the compensation. Secondly, the filing and service of the present suit vide originating summons against the first defendant clearly indicated an intention on the part of the plaintiffs to terminate the agreement.

[17] For the reasons adumbrated the court finds that the first defendant repudiated the agreement when it refused to perform its obligations under the agreement in its entirety. The plaintiffs accepted the repudiation and terminated the agreement.

(c) Whether the plaintiffs were adequately compensated

[18] The law on compensation for loss or damage caused by breach of contract is governed by sub-s (1) and (2) in s 74 of the Contracts Act 1950 which read as follows:

> 74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

A (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[19] The measure of damages recoverable therefore involves the consideration of s 74 which substantially affirms the common law rule laid down in *Hadley v Baxendale* (1854) 156 ER 145. The common law rule affecting the measure of damages came up for consideration by the Federal Court in *Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39. At p 40 Ong Hock Thye FJ said:

C The rule lays down the main principles as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

E In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* in a passage which I shall quote in full:

> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v Chicoutimi Pulp Co*) This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however, improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,
>
> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary sense. This is the subject matter of the 'first rule' in *Hadley v Baxendale*. But to this knowledge, which a contract breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to

cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach if he had considered the question, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parq in the recent case of *Monarch Steamship Co Ltd v Karlshamms Olejefabriker (A/B)*).

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parq in the same case at p 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

[20] In short, the common law rule in the assessment of damages consists of two limbs. The first limb concerns damages flowing naturally, ie in the normal course of things from the breach. The second limb concerns the damages that the parties at the time of the making of the contract may reasonably be supposed to have contemplated, as the probable result of the breach. This court is also mindful that in the assessment of damages for breach of contract, the general rule is that the aggrieved party be put in the same position as if the contract had been performed; so that normally he is entitled to recover from the contract breaker his loss of profits, or the benefit of the bargain, as it is often called (see *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174).

[21] Learned counsel for the plaintiffs argued that the compensation paid to the plaintiffs was wholly and grossly inadequate. Firstly, the money paid out by the second defendant to the plaintiffs was guided by a valuation report (exh P39) prepared as at 27 December 1992. This report is irrelevant and out of date as the plaintiffs were displaced in 2001, some nine years after the date of valuation. On the other hand, according to two valuation reports (exhs P48 and P50) prepared at the instance of the plaintiffs, the valuation is RM300,000 per acre. The plaintiffs' valuation report was not challenged or refuted by the defendants as the defendants did not call any evidence in rebuttal. P39 was prepared in 1992 when there was no development on the FTR land in the agricultural and commercial sense and without proper amenities and infrastructure. The situation in 2001 was very different with proper roads, *balai raya*, taxi services, schools, mosques, telephone, lighting

A and water amenities for the local population (*Hock Lim Estate Sdn Bhd v Collector of Land Revenue, Johore Bahru* [1980] 1 MLJ 210; *Chuah Say Hai & Ors v Collector of land Revenue, Kuala Lumpur* [1967] 2 MLJ 99).

B **[22]** On this issue learned counsel for the first defendant submitted that under the agreement the plaintiffs are obliged to pay all the development costs advanced by the first defendant for the FTR project. The first defendant has claimed all the development costs from the third defendant. The first defendant has no power or authority on the amount of compensation to be paid to the plaintiffs. The first defendant's duty was only to issue the letter to C the plaintiffs to collect their cash compensation. The formula for the distribution of the compensation was prepared by Unit Perancang Ekonomi Negeri of the third defendant.

D **[23]** In view of the court's earlier finding that the plaintiffs do not have an interest in the land, the valuation reports P48 and P50 are irrelevant in the assessment of damages. What are the damages flowing naturally from the breach, or which the parties knew at the time of the making of the agreement to be the probable result of the breach? Under the agreement the plaintiffs E agreed to sell all the harvested oil palm fruits to the first defendant. The proceeds from the sale of the oil palm fruits were subject to deductions on account of monies advanced by the first defendant, the first defendant's operating expenses and development costs. The first defendant utilised the balance of the sales proceeds to pay cash or in dividends to the plaintiffs on F Hari Raya and schooling and to the Koperasi and Tabong Kebajikan.

[24] The plaintiffs were from Tebing Runtuh 2 and Tebing Runtuh 3. There are altogether 224 participants in Tebing Runtuh 2 (list of participants exh P33). According to the first defendant's statement of income and G expenditure account for Tebing Runtuh 2 for the period 1994–1996 (exh P49) the sale proceeds in 1996 is RM768,262.12. The balance of the sales proceeds after deductions amounted to RM303,876.92; of which RM186,254 was distributed for Hari Raya and RM117,876.92 was also distributed. However, the market price of oil palm fruits would have also H fluctuated between 1997–2000. Taking the 1996 figures as a guide, the total amount distributed to each of the participants is RM1,356 per participant. No statement of accounts for the years 1997–2000 was produced at the trial. Allowing for an increase in production over the years and subject to a commensurate increase in operating expenditure, it is reasonable to round up I that the amount that would have distributed to each participant at about RM3,000pa from 2001–2009; this computes to RM27,000 for each plaintiff.

[25] It is also reasonable to consider the loss for the displacement suffered by the plaintiffs. The plaintiffs have settled in FTR since 1994. When they

agreed to take part in FTR they had expected it to be a long term commitment. Instead they have been displaced after a period of seven years. They have given up their former vocations after resettling in FTR. After their displacement many of them have lost their livelihood and have had to make a fresh start in life. For the loss and damage for the displacement of their lives, compensation in the sum of RM500,000 per participant is a fair and reasonable sum. Taking into account that each of the plaintiffs have already received the monetary equivalent of RM358,688.58 in compensation, each of the plaintiffs should be entitled to receive the balance of RM168,311.42. In the premises the question is answered in the negative.

[26] In consequence of the above findings the plaintiffs' claim against the second and third defendants is dismissed with costs. As against the first defendant the court orders that the first defendant pays to each of the plaintiffs the sum of RM168,311.42 together with interest at 8%pa with effect from 2 May 2001 until the date of satisfaction; costs to be taxed unless otherwise agreed.

Plaintiffs' claim against the first defendant allowed with costs and claim against the second and third defendants dismissed with costs.

Reported by Kanesh Sundrum